Supreme Court, U.S.
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No. 95-130

In The

Supreme Court of the United States

October Term, 1995

CORNISH SHIPPING LTD.,

Petitioner,

vs.

INTERNATIONAL NEDERLANDEN BANK N.V., f/k/a NMB POSTBANK GROEP, N.V.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

PETER J. GUTOWSKI
Counsel of Record
MICHAEL FERNANDEZ
BARBARA G. CARNEVALE
FREEHILL, HOGAN & MAHAR
Attorneys for Petitioner
80 Pine Street
New York, New York 10005
(212) 425-1900

7097
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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CORNISH'S PRELIMINARY STATEMENT AND RESPONSE TO INB'S STATEMENT OF THE CASE

The thrust of INB's Brief In Opposition is designed to downplay how significant an impact the *Cornish* decision will have on the shipowning community, and otherwise convince the Court that this is just another "run of the mill" admiralty decision which should be brushed aside. Nothing could be further from the reality of the situation. In fact, what this Court has to decide is whether it is prepared to permit a major erosion of the shipowner's lien on subfreight in favor of the banking community.

Contrary to the position asserted by INB, Cornish does not seek an extension of the lien on subfreight. Similarly, Cornish does not even suggest that it should be permitted to chase the funds into the pocket of the charterer. Instead, Cornish seeks merely to reestablish the fundamental nature of its *in rem* right to proceed against the *res*.

Prior to the *Cornish* decision, the test determination of a shipowner's entitlement to subfreight was evaluated under a straightforward, almost mechanical test involving the status of the *res* at the time the shipowner exercised its lien. The *Cornish* decision changed both this test and the fundamental nature of the lien in favor of lending institutions which routinely finance these transactions. Henceforth, such land based junior lienors will be free to actively participate with impunity in the payment transaction, thereby destroying the shipowner's superior lien.

The only thing Cornish seeks from this Court is an opportunity to restore a level playing field in this aspect of admiralty law on which there is now division among the Circuits.

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE LIEN ON SUBFREIGHT CAN HARDLY BE DESCRIBED AS "SECRET" AND THE ENFORCEMENT OF AN EXISTING LIEN IS NOT SUBJECT TO THE DOCTRINE OF *STRICTI JURIS.*

The shipowner's lien on subfreight can hardly be described as "secret", especially in the context of financial institutions which routinely lend on these transactions.[1] Indeed, it can hardly be described as secret to anyone even remotely familiar with ocean transportation. The lien has been recognized as far back as the last century, and has been incorporated in the standard NYPE form charter party for almost 100 years (Petition at 7).

In the case of INB, it certainly came as no surprise. INB admittedly financed numerous prior charter party transactions for Ferromet (Br. In Opp. at 2), and had specifically required that a copy of the Cornish charter party be provided to it with the Letter of Credit documents. More importantly, INB's own financing documentation with Ferromet specifically carved out an exception for these types of carrier liens.[2] As such, INB's intimation that Cornish's lien came as a surprise rings hollow, and its suggestion that this so-called secret lien operated to its prejudice flies in the face of its own financing documentation.

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1. The reference to these types of liens being secret merely refers to the fact that recording is not a prerequisite. The same holds true for INB's assignment from Ferromet of the rights to the proceeds.

2. The security agreement between INB and Ferromet specifically excluded what was described as "permitted liens", a term defined to include liens imposed by law for carriers, materialmen, warehousemen,. . . and other like liens arising in the ordinary course of business.

Similarly, INB's repeated references to the doctrine of *stricti juris* in connection with its argument that Cornish seeks to expand its lien is misplaced (Br. In Opp. at 7). Within an established category of liens, the doctrine is generally not applied. Instead, a liberal interpretation is given to ensure effective enforcement. *See Atlantic & Gulf Stevedores v. M/V Grand Loyalty*, 608 F.2d 197, 201 (5th Cir. 1979):

> It is abundantly clear that new types of maritime liens may not be created; however, it appears equally clear that the doctrine of *stricti juris* does not affect the mechanics of the imposition of traditionally recognized varieties of maritime liens.[3]

Therefore, and in the context of Cornish's enforcement of its well recognized lien on subfreight, this Court should not apply a restrictive or narrow interpretation as to how that lien can be enforced.

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3. *See also* 2 T. Russel, *Benedict on Admiralty*, § 39 at 3-44 (1995) *citing Payne v. S.S. Tropic Breeze*, 423 F.2d 236 (1st Cir.), *cert. denied*, 400 U.S. 964 (1970), *modified on other grounds*, 456 F.2d 137 (1st Cir. 1972); 7A J. Moore, *Moore's Federal Practice*, ¶ C.07 at 660 (2d ed. 1995) ("Clearly, the 'extensions' against which the Supreme Court has long admonished were not intended to impede normal growth."); *Clubb Oil Tools, Inc. v. M/V George Vergottis*, 460 F. Supp. 835, 840 (S.D. Tex. 1978) (citing authority calling for a liberal interpretation of the term "necessaries" [an established category of liens] within the scope of the Federal Maritime Lien Act).

II.

CORNISH SEEKS NO EXPANSION OF ITS MARITIME LIEN ON SUBFREIGHT BUT ONLY ENFORCEMENT OF THAT LIEN.

INB suggests that the relief sought by Cornish would constitute an expansion of the maritime lien on subfreight. Cornish is not asking this Court to fashion a new lien or even extend the scope of its clearly recognized lien on subfreight. Cornish merely seeks enforcement of its lien against the *res* — the traditional enforcement remedy.[4]

INB's motivation in this case is clear. The *Cornish* decision significantly enhances the value of the bank's land based security interest. Further, the decision insulates the bank against criticism for manipulation of the transfer into its hands — the very basis upon which it now argues that the lien is lost. Cornish seeks only to reestablish the lien to its original status.

III.

CORNISH'S LIEN ON THE SUBFREIGHT WAS SUPERIOR TO THE BANK'S INTEREST AND REQUIRED SEGREGATION OF THE FUND UPON RECEIPT SINCE NOTICE WAS GIVEN BEFORE THE TRANSFER.

There is no dispute that INB was a competing creditor of the shipowner (Cornish) in this case (Br. In Opp. at 2). In addition, there is no dispute that Cornish's maritime lien primes the bank's interest and, in fact, prevails over *all* non-maritime security

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4. In fact, it is INB that seeks an artificial restriction of the shipowner's lien, narrowing its focus solely to an *in personam* action against the payor.

interests.[5] Finally, the shipowner's superior lien on subfreight mandates that a land based assignee "assumes the risk that his rights are subordinate to the owner's." 2 T. Russel, *Benedict on Admiralty*, § 45 at 3-70 (1995).

Despite these established principles, the Court below fashioned a new subfreight test which changed the focus of the lien. By so doing, the Court allowed the bank to retain the subfreight, despite prior service of Cornish's notice of lien and Rule C Arrest. In an effort to sustain this ruling, INB would have this Court believe that restoring the focus of the lien to the *res* itself would wreak havoc on the banks because it would supposedly enable a shipowner to chase subfreight into a charterer's account. This is not Cornish's position, Cornish does not seek such relief, and INB grossly overstates the ramifications of a restoration of the lien.

INB's obligation upon receipt of the subfreight was simple: it was obliged to segregate that fund pending further Court order regarding priority. This obligation could hardly be described as being even remotely disruptive of banking practice. Moreover, such duty will not work to the prejudice of other creditors of the charterer since the fund would be maintained in a segregated account, thereby providing notice of the shipowner's interest.

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5. *See The Lottawanna*, 87 U.S. 201, 221 (1874); G. Robinson, *Robinson On Admiralty*, §§ 60, 61 (1939); 2 T. Russell, *Benedict on Admiralty*, § 51 (1995); G. Gilmore & C. Black, *The Law of Admiralty*, at 734 (2d ed. 1975)("The two simplest propositions are that maritime claims outrank non-maritime claims. . . "); *see also In Re Topgallant Lines, Inc.*, 125 B.R. 682, 687 (Bankr. S.D. Ga. 1991) *citing The Freights of the Kate*, 63 F.707 (D.N.Y. 1894); ("It is well settled that the holder of a valid maritime lien enjoys a priority position superior to the holder of a consensual assignment for collateral purposes of an interest in freights."); *Taiwan Int'l Line Ltd. v. Matthew Ship Chartering Ltd.*, 546 F. Supp. 826, 829 (S.D.N.Y. 1982) (Shipowner's lien on subfreight prevails over prior land based security interest in proceeds of the charterer.)

In a similar vein, INB's argument that Cornish's position will have a negative impact on banking commerce is groundless. For as long as this lien has been in existence, banks have been lending money to charterers to finance ocean transportation notwithstanding the lien on subfreight. Accordingly, there is no substantive justification for the erosion of the shipowner's lien which has occurred in this case in favor of the banks.

CONCLUSION

This is the only time a bank has been able to interject itself into the subfreight payment transaction, and successfully retain those subfreights despite a prior exercise by a shipowner of its superior lien on that *res*. The *Cornish* decision's nullification of such a fundamentally important shipowner's remedy stands in stark contrast to general maritime lien law, and necessitates this Court's intervention so as to restore uniformity among the Circuits. Certiorari should be granted.

Respectfully submitted,

PETER J. GUTOWSKI
Counsel of Record
MICHAEL FERNANDEZ
BARBARA G. CARNEVALE
FREEHILL, HOGAN & MAHAR
Attorneys for Petitioner
80 Pine Street
New York, New York 10005
(211) 425-1900